Office-Supreme Court, U.S.
FILED
MAR 11 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-271

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

CARLOS CHARDON, ETC., *et al.*, *Petitioners*,

v.

JUAN FUMERO SOTO, *et al.*, *Respondents*.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Pursuant to Rule 35.3 of this Court's Rules, petitioners submit this Reply to the Brief of Respondents.

The central issue in this case is whether this Court's decision in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), applies to and controls statute of limitations tolling questions in purported class actions brought in federal court seeking relief under 42 U.S.C. § 1983. A number of lower federal courts have held that it does; only one court, the court below in this case, has held that it does not: "[I]n a § 1983 case, the federal rule and underlying reasoning of *American Pipe*, are not generally applicable." J.A. 134a. This erroneous holding should be reversed.

I. The Rule Of *American Pipe* Is Clear.

Critical to a determination of the applicability of the rule of *American Pipe* is an understanding of the basis, rationale and operation of the rule. Petitioners believe that the rule is clear:

The filing of a purported class action in federal court suspends the running of the applicable statute of limitations as to all asserted members of the class until a decision is reached whether to certify the class; after denial of class certification, the statute resumes running as to the previously asserted members of the class and they have whatever time remained to them in the limitations period when the purported class suit was filed within which to move for permission to intervene, or possibly to file a separate law suit. 414 U.S. at 553-54, 560-61.

In their opening brief, petitioners explained the basis, rationale and operation of the rule, Pet. Br. at 10-16, and pointed out that, even though the court below refused to apply the rule, it shared petitioners' understanding of it. Pet. Br. at 12; J.A. 131a-132a. Respondents, however, now suggest that the rule of *American Pipe* actually consists of two rules: (1) a generally applicable rule limited to the tolling effect of the *commencement* of a purported class action as to asserted members of the purported class—"general tolling"; and (2) a separate rule under which the effect of the *denial* of class certification is to be determined by "the limitations scheme applicable to the particular substantive cause of action"—"precise tolling effect." Resp. Br. at 10.

This novel construction of *American Pipe* is advanced by respondents as an essential underpinning for their contention that they can, as they put it, "have it both ways," that is, (1) under "general tolling," take advantage of the federal rule of *American Pipe* only to the extent that it holds that commencement of the class action tolls the running of the statute of limitations as to them, as asserted members of the class; and then (2) under "precise tolling effect," take advantage of Puerto Rico's allegedly applicable "running anew" rule, so as to render their suits timely filed. Resp. Br. at 17.

There is, however, no basis whatsoever for the notion that *American Pipe* established such a two-step tolling rule. Indeed, respondents' so-called "precise tolling effect" concept is drawn only from their misreading of the conclusion of the

American Pipe opinion, where the Court began by saying: "It remains to determine the precise effect the commencement of the class action had on the relevant limitation period." 414 U.S. at 560-61. All the Court was doing in this concluding paragraph was reiterating its decision reached six pages earlier that the filing of the class action suspended the running of the statute of limitations,[1] then looking to see how long that suspension lasted, and then determining whether there was sufficient time remaining in the statutory period after it resumed running to render the intervention motions timely.

While the Court did see a parallel between its holding and the suspension effect given the initiation of a Government antitrust suit on the statute of limitations applicable to private antitrust plaintiffs under Section 5(b) of the Clayton Act, that fact in no way supports the notion advanced by respondents that the suspension rule of *American Pipe* results from a construction of Section 5(b) of the Clayton Act—as the "limitations scheme applicable to the particular substantive cause of action." Resp. Br. at 10. As noted by the Court of Appeals in *Pavlak* v. *Church*, 681 F.2d 617, 619 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3320 (U.S. October 12, 1982) (No. 82-650):

> "Although *American Pipe* concerned a cause of action under the federal antitrust laws, this was in our view an accidental feature of the case; the rule of tolling adopted there was an equitable incident of federal procedure."

Respondents seek to bolster their "precise tolling effect" theory by saying that it "draws considerable support from this Court's earlier decision in" *Burnett* v. *New York Central R.R.*, 380 U.S. 424 (1965). Resp. Br. at 11. *Burnett*, however, in-

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[1] "We are convinced that the rule most consistent with federal class action procedure must be that the *commencement of a class action suspends the applicable statute of limitations* as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554 (emphasis added; footnote omitted).

volved a federal statute of limitations applicable to a federal cause of action under the Federal Employers Liability Act ("FELA"). There, the Court determined to exercise its judicial power to toll the running of the statute of limitations where the plaintiff timely filed suit in state court, the case was dismissed for improper venue, but plaintiff promptly refiled suit in federal court. The Court held that such tolling was consistent with the Congressional intent underlying FELA, and found that this result was analogous to its earlier ruling in *Herb* v. *Pitcairn*, 325 U.S. 77 (1945), where the Court had held that, if a state FELA action with improper venue was transferred to another state court with proper venue (*i.e.*, rather than being dismissed and refiled), such a transfer after the statute of limitations had run would not render the action untimely. The Court in *Burnett*, for federal policy reasons, adopted this federal tolling rule for uniform application, and expressly declined to incorporate into the federal scheme a state savings statute that would have led to a similar result. 380 U.S. at 433-34. To this extent, if *Burnett* is at all relevant to the instant case, it supports petitioners, since it involves application of a uniform federal rule of tolling, rather than state law, to resolve a tolling issue in a federal action.

II. Application Of The Federal Rule Of *American Pipe* Is Required In This Case.

Respondents argue that 42 U.S.C. § 1988, as construed by this Court in *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980), requires the application of Puerto Rico law, not the federal rule of *American Pipe*, to determine the tolling issue involved here. Resp. Br. at 13-18. That argument lacks merit.

Although the *Tomanio* Court found that, under the circumstances there involved, Section 1988 required the application of state law, in the instant case application of the federal rule of *American Pipe* is required "to insure effectuation of the purposes of litigative efficiency and economy" that Rule 23 is designed to serve. 414 U.S. at 556. *See*, Pet. Br. 13-19. As such, the federal rule of *American Pipe* should apply uniformly

throughout the federal courts, and analysis of 42 U.S.C. § 1988 should be unnecessary. Yet, even if such analysis is made, it is clear that the federal rule of *American Pipe* controls.

As this Court stated in *Tomanio*: "*In 42 U.S.C. § 1988, Congress 'quite clearly instructs [federal courts] to refer to state statutes' when federal law provides no rule of decision* for actions brought under § 1983." 446 U.S. at 484 (emphasis added; footnote and citations omitted). The federal rule of *American Pipe* provides the "rule of decision" to be applied in this case, and thus it is unnecessary to resort to Puerto Rico law.

It is clear that a judicial interpretation of a Federal Rule of Civil Procedure may constitute a "rule of decision" for purposes of § 1988. For instance, in *Bomar* v. *Keyes*, 162 F.2d 136 (2d Cir.), *cert. denied*, 332 U.S. 825 (1947), cited in petitioners' opening brief at p. 17, the Court of Appeals held in a Section 1983 case that the applicable state statute of limitations was tolled by the filing of the plaintiff's complaint in federal court. The court reached that conclusion based on its interpretation of Rule 3, Fed. R. Civ. P.[2] In doing so it established a federal procedural rule of tolling. That rule has been acknowledged and implicitly approved by this Court. *Cf. Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 751 n. 11 (1980); *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 533 (1949). Moreover, it was recently applied in a Section 1983 action as a federal rule precluding resort to state law under Section 1988 and *Tomanio*. *See Cohen* v. *Board of Education of East Rama-*

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[2] Respondents attempt to distinguish *Bomar* from the instant case on the ground that, while Rule 23 says nothing on its face about tolling, "Rule 3 of the Federal Rules of Civil Procedure explicitly answer[s] the question of when an action is 'commenced' for tolling purposes." Resp. Br. at 27. Rule 3 itself refutes that argument, as it provides in its entirety as follows: "A civil action is commenced by filing a complaint with the court." Clearly, Rule 3 does not address, on its face, the question of what effect "commencement" has on the running of the applicable statute of limitations.

po Central School District, 536 F. Supp. 486, 495 (S.D.N.Y. 1982), discussed in petitioners' brief at pp. 23-24.

Thus, respondents' argument—that only federal statutes can constitute "rules of decision provided by federal law" for purposes of Section 1988 and *Tomanio*—is plainly wrong.[3] Similarly, respondents' argument finds no support in this Court's refusal to apply the *ad hoc* federal common law rules developed by the lower federal courts in *Tomanio* and *Robertson* v. *Wegmann*, 436 U.S. 584 (1978). Resp. Br. at 26, 27. Obviously there is a substantial difference between those cases, where this Court rejected the use of "federal rules" invented *in those very cases* to preserve the plaintiff's causes of

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[3] In addition, a decision of this Court construing Section 1988 strongly suggests that federal decisional law may constitute a federal "rule of decision" under that provision. In *Moor* v. *County of Alameda*, 411 U.S. 693 (1973), this Court rejected petitioners' attempt to hold the respondent County vicariously liable under 42 U.S.C. §§ 1983, 1988 for the acts of its officials in contravention of petitioners' constitutional rights. Petitioners conceded that the County's liability under Section 1983 was foreclosed by this Court's decision in *Monroe* v. *Pape*, 365 U.S. 167 (1961), *overruled*, *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658 (1978), that a state's political subdivisions were immune from civil liability under Section 1983. On this basis, petitioners concluded that Section 1983 was "deficient in the provisions necessary to furnish suitable remedies," 411 U.S. at 700, thus justifying the utilization, under the provisions of Section 1988, of California law, under which the County could be held vicariously liable. The Court held, *inter alia*, that the use of this California law would be inconsistent with its decision in *Monroe* v. *Pape* "that Congress did not intend to render municipal corporations liable to federal civil rights claims under § 1983." 411 U.S. at 706 (citations omitted). Clearly, if the Court's decision in *Monroe* v. *Pape* could be considered a "law of the United States" for purposes of an "inconsistency" determination under Section 1988, then another decision of this Court, *American Pipe*, can constitute a federal "rule of decision" under Section 1988 which precludes the need to look to or apply Puerto Rico law in the instant case.

action, and the instant case, where petitioners rely on a pre-existing uniform federal procedural rule, established by this Court as necessary to the proper functioning of Rule 23 of the Federal Rules of Civil Procedure.[4]

III. Important Federal Policies Dictate Application Of The Rule Of *American Pipe* In This Case.

Petitioners demonstrated in their opening brief that application of the federal procedural rule of tolling established in *American Pipe* is entirely consistent with the important federal policies relevant to this case—uniformity, federalism, and

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[4] In arguing against application of the rule of *American Pipe* on the ground that it is merely federal decisional law not within the meaning of "federal law" in Section 1988, respondents also invoke, by analogy, the Rules of Decision Act, 28 U.S.C. § 1652. Resp. Br. at 26. They assert that "federal law" within the meaning of Section 1988 should be defined consistently with the terms of the Act, which do not, on their face, include federal decisional law.

The longstanding decision of the Court of Appeals in *Moviecolor Ltd.* v. *Eastman Kodak Co.*, 288 F.2d 80 (2d Cir.), *cert. denied*, 368 U.S. 821 (1961), casts considerable doubt on the correctness of respondents' analogy, at least in cases involving federal causes of action. In *Moviecolor*, a federal antitrust action governed by a state statute of limitations, the Court of Appeals found that in proper factual circumstances, the federal tolling doctrine of fraudulent concealment could toll the running of the state limitations period, despite a contrary state law rule. Rejecting an argument for a contrary result based on the Rules of Decision Act, Judge Friendly stated:

> "No distortion of language is required to read § 1652 as meaning that *state rules refusing to suspend the running of a period of limitations need not be followed in any action to enforce a federally created right*, whether on the ground that the Act of Congress establishing the right impliedly 'otherwise require[s] or provide[s],' exactly as when Congress has established its own period of limitation, or *on the ground that state rules do not 'apply' in actions to enforce federally created rights as against an established contrary federal decisional rule.*" 288 F.2d at 86 (emphasis added).

repose. Pet. Br. at 24-32. Respondents have utterly failed to refute these arguments.

Respondents make no attempt to address the concerns for judicial economy and efficiency that underlie Rule 23, Fed. R. Civ. P. Those concerns are the same in every federal class action, and thus Rule 23, as interpreted in *American Pipe*, should be applied uniformly, regardless of the subject matter of the cause of action or the source of the applicable statute of limitations. Respondents' only comment on the policy of uniformity is the feeble assertion that, "[the *American Pipe*] suspension rule . . . would not significantly promote procedural uniformity because it would necessarily be applied to many federal and state statutes of limitations with very different limitations periods." Resp. Br. at 17-18. This argument clearly misses the point. The issue here is not whether periods of limitation are to be uniform in all cases, but whether there is to be uniformity in the effect the commencement of a class action brought in federal court has on the running of the applicable statute of limitations.

Respondents also suggest that the procedural uniformity urged by petitioners would lead to non-uniformity in other areas. Specifically, they claim that application of the *American Pipe* rule to Section 1983 class actions would result in the "anomaly of applying one tolling rule to an individual § 1983 suit and another tolling rule to a § 1983 class action, where both are brought in federal court." Resp. Br. at 17. This argument makes no sense. Even if there were some difference, it would exist because of the obvious and basic differences between individual actions and class actions.[5] Yet, the fact is that there

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[5] This Court, in a different context, noted that "[t]here are special rules relating to class actions and, to that extent, they are a special kind of litigation." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 470 (1978). Indeed, the very procedural concerns prompting adoption of the *American Pipe* rule—*i.e.*, the filing of a multiplicity of individual pleadings or protective motions thus frustrating the objectives of

is no anomaly. The person who brought the class suit initially would have the benefit of his own filing date for statute of limitations and tolling purposes. If the class is not certified, the asserted non-party "members" are, through "legal fiction," carried back in time to that filing date so that the statute will not have run against them. They can then intervene in the original suit or, as some courts have held, file their own individual suits. If the named plaintiff's original action or any of the subsequent individual actions are thereafter dismissed for procedural reasons short of a decision on the merits, the parties' causes of action would then be subject *equally* to whatever tolling, "savings," or other effects as may exist under applicable law.

Concerning the policy of federalism, respondents devote most of their arguments to attempting to demonstrate why the First Circuit's creation of a Puerto Rico tolling rule below is proper and should be deferred to by this Court.[6] Resp. Br. at 21. The arguments are plainly inadequate. Relying on Puerto Rico cases which clearly involved only individual, not class actions, respondents assert in conclusory fashion that the decision below is "proper" and "correct." *See* Resp. Br. at 19-20 and cases cited therein. These assertions are, however, unsupported by any legal reasoning or policy arguments as to why previous interpretations of Puerto Rico's tolling statute, 31

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judicial economy and efficiency that Rule 23, Fed. R. Civ. P., was designed to serve—are not even relevant in the context of an individual suit.

[6] Actually, the deference that is due is to the Supreme Court of Puerto Rico by the federal courts, *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41 (1970), and to the District Court of Puerto Rico by the higher federal courts:

> "Particularly where the question involves the proper construction of Puerto Rican law, deference to the district judges who are Spanish speaking and trained in the Spanish civil law is warranted." *Gual Morales* v. *Hernandez Vega*, 579 F.2d 677, 682 (1st Cir. 1978) (citations omitted).

L.P.R.A. § 5303—clearly limited to individual suits and only as to identical causes of action—should be expanded to apply to the asserted non-party members of this purported federal Section 1983 class.

Indeed, there are strong policy reasons within Puerto Rico law against such an expansive approach. In *Diaz de Diana* v. *A.J.A.S. Insurance Co.*, No. 0-79-467 (P.R.S.Ct. December 11, 1980) (reproduced as an appendix to the Reply Brief in the court below of Defendants-Appellants-Cross-Appellees, petitioners herein), the Supreme Court stated that " 'the acknowledged principle of interruption is the *unmistakable manifestation* of one who, threatened with the loss of his right, expresses his wish not to lose it.' " *Slip. Op.* at 6, *quoting Feliciano* v. *A.S.A.*, 93 P.R.R. 638, 660 (1966) (emphasis in original). This statement shows interruption (tolling) to be an entitlement personal to one who takes some action to protect his or her own rights, a view flouted by the First Circuit's extension of the concept to respondents, none of whom took any action in his or her own behalf until January 1979, more than a year and a half after their alleged civil rights actions had accrued. In addition, the holding of the court below contravenes the strict admonition of the Puerto Rico Supreme Court in *Diaz de Diana* that:

> "The jurisprudence of the Supreme Court of Spain has restated that since it is an exception to the extinguishment of a right because of limitation of actions, *anything causing an interruption must be interpreted restrictively.*" *Slip Op.* at 5 n. 1 (emphasis added; citations omitted).

Clearly, this principle cannot be reconciled with the First Circuit's expansive and unprecedented interpretation of Section 5303.[7]

Moreover, the First Circuit's own opinion indicates the absence of any basis for its conclusion in either the statutory or

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[7] Ironically, the First Circuit's decision below on an issue not here involved, and several previous decisions of that court were entirely consistent with *Diaz de Diana*. In rejecting respondents' "extra-

decisional law of Puerto Rico.[8] Again, this fact alone clearly supports petitioners' position that, under this Court's reasoning in *Tomanio*, the Commonwealth of Puerto Rico intended no tolling to occur in these circumstances. *See* Pet. Br. at 27-28.

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judicial claims" tolling argument below, the First Circuit adhered to its decisions in *Gual Morales* v. *Hernandez Vega*, 604 F.2d 730 (1st Cir. 1979), and *Hernandez del Valle* v. *Santa Aponte*, 575 F.2d 321 (1st Cir. 1978), narrowly construing Section 5303. J.A. 141a-143a. In *Hernandez del Valle*, for example, the court stated:

> "[W]e observe that § 5303 goes considerably beyond any tolling provisions of which we were aware in the United States . . . . At the very least, the unusual problems presented by this provision *constrain us from extending its application beyond situations where the courts of the Commonwealth have held it to apply.*" 575 F.2d at 323 (emphasis added).

The court, however, disregarded both Puerto Rico law and its own rule of restraint in "interpreting" Section 5303 in this case.

[8] Such law as can be found suggests a contrary result to that reached by the First Circuit. The conclusion of the court below that the Puerto Rico courts would not follow the *American Pipe* rule seems especially misguided since Puerto Rico's present class action rule is modelled on Rule 23, Fed. R. Civ. P. (J.A. 135a), and the *American Pipe* rule is an interpretation of Rule 23. The Puerto Rico Supreme Court, in applying the class action rule, "[h]as not hesitated to cite . . . recent cases decided in the Federal courts under Rule 23(a) even though technically we are [not] applying . . . [that] Rule." *People* v. *Henneman*, 69 P.R.R. 927, 931 (1949).

Moreover, the one decision of the Supreme Court of Puerto Rico arguably relevant is inconsistent with the First Circuit's view of Puerto Rico law. In *Caguas Lumber Yard, Inc.* v. *Superior Court*, 96 P.R.R. 826 (1969), employees sued seeking back wages for themselves and similarly situated employees under old Rule 20.1(c), P.R.R. Civ. P., the same pro sion that would have governed Ortiz Rivera's proposed class suit, had it been filed in local court. The Supreme Court held that the action had *no legal effect* on the similarly situated employees that plaintiffs purported to represent, absent action by the former to join in the suit, and further noted that the

Respondents attempt to rationalize the construction given by the court below to Puerto Rico's Section 5303 by showing its purported similarity to "savings statutes" enacted by several states. Here again, however, respondents fail to cite a single example of a federal or state class action in which a state savings statute was held to extend or renew the statute of limitations period for asserted class members, or which even suggested that a savings statute was relevant in such a context.[9] Moreover, ". . . a [savings] statute specifically gives to a *plaintiff whose timely action* is dismissed for procedural

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Order issued by the lower court by means of which the similarly situated employees were to be identified "[did] not make these employees plaintiffs . . . ." 96 P.R.R. at 834. Thus, under traditional Puerto Rico law, there is no basis for the First Circuit's finding that the proposed class action complaint had a tolling effect for unnamed, and otherwise inactive, asserted class members.

Finally, the District Court of Puerto Rico has specifically held in a related case that the tolling rule applicable to one of the asserted members of Ortiz Rivera's purported Section 1983 class was the federal rule of *American Pipe*. *Carmen Zoraida Arroyo Quiles* v. *Chardon*, Civil No. 79-75 (PG) (D.P.R. January 20, 1982) (order granting summary judgment for defendants and dismissing complaint), *appeal docketed*, Nos. 82-1242, 82-1481 (1st Cir. May 17, 1982).

[9] Indeed, relevant case law suggests the opposite conclusion. Petitioners have found decisions in at least eight states in which the courts, often having noted that the state class action rule was modelled on Rule 23, Fed. R. Civ. P., have expressly adopted as state law the *American Pipe* federal procedural rule of tolling. *See*, *Pope* v. *Intermountain Gas Co.*, 646 P.2d 988, 1010 n.28 (Idaho 1982); *Munsterman* v. *Illinois Agricultural Auditing Association*, 435 N.E.2d 923, 926 (Ill. App. 1982); *First Baptist Church of Citronelle* v. *Citronelle-Mobile Gathering, Inc.*, 409 So.2d 727, 729-30 (Ala. 1981); *Nolan* v. *Sea Airmotive, Inc.*, 627 P.2d 1035, 1041-47 (Alaska 1981); *Arnold* v. *Dirrim*, 398 N.E.2d 426, 439-40 (Ind. App. 1979); *Douglas* v. *Arthur Andersen & Co.*, 416 N.Y.S.2d 751, 752 (App. Div. 1979); *Levine* v. *Empire Savings and Loan Association*, 579 P.2d 642, 646

reasons such as improper venue a specified time in which to bring a second action." *Burnett* v. *New York Central R.R.*, 380 U.S. at 432 (emphasis added). Of course, asserted members of a purported class action cannot be considered "plaintiffs" in any sense unless and until the class is certified, or if not certified, they intervene or bring another suit. *Cf. American Pipe & Construction* v. *Utah*, 414 U.S. 538 (1974). Thus, whatever the merit of respondents' comparison of Section 5303 with "savings statutes," it has no relevance here.

Addressing the policy of repose, respondents merely point to the conclusion reached below that "all of the parties in these cases are Puerto Rican, and hence there is no unfairness . . . in applying to them the relevant Puerto Rico tolling law." Resp. Br. at 18. Petitioners have already demonstrated how incorrect this conclusion is. The unfairness of the impact of the novel, unprecedented, and unanticipated interpretation of Puerto Rico law by the court below on petitioners' interests in repose is patent. *See* Pet. Br. at 30 & n. 15.

In short, respondents have not really met, much less contradicted petitioners' position that all three of the important federal policies accorded decisional significance by this Court in *Tomanio* are fully consistent with, and indeed militate in favor of the application of the federal procedural rule of tolling established by this Court in *American Pipe*, rather than the *ad hoc* Puerto Rico tolling rule developed by the court below.

(Colo. App. 1977); *Bergquist* v. *International Realty, Ltd.*, 537 P.2d 553, 561 (Or. 1975) (en banc). Of the eight states from which these decisions come, five, Illinois, Alaska, Indiana, New York, and Oregon, have savings statutes of the type discussed at length by respondents in their brief. Yet, in none of the decisions from the courts of these states applying *American Pipe* is it even suggested that the states' savings statutes might have any relevance to class action tolling issues.

IV. Application Of The Rule Of *American Pipe* In This Case Does Not Violate The Rules Enabling Act.

The Rules Enabling Act proscribes such federal procedural rules as would "abridge, enlarge or modify any substantive right . . . ." 28 U.S.C. § 2072 (1976). Respondents' final argument[10] is that if Rule 23, Fed. R. Civ. P., is applied in this

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[10] Actually, their final argument appears in a concluding footnote, where they request a remand to the court below should this Court hold for petitioners.

First, respondents propose a new "extended tolling" theory which, if accepted, would save as timely filed the actions of three of the thirty-six respondents herein. *See* Appendix hereto, 1A-7A, which gives as to each respondent the number of days remaining in his or her statute of limitations period as of the date the class suit was brought (Col. IV), the expiration of the statute of limitations after denial of class certification (Col. V), and the date the complaint was filed (Col. VI). Under this "extended tolling" theory, suspension of the statute of limitations would have continued beyond the denial of class certification on August 21, 1978, because "there was a motion for reconsideration which was denied on September 29, 1978 . . . ." Respondents have cited no authority, and petitioners know of none, which would support their claim that this motion, filed September 11, 1978, or any of the subsequent motions referred to, all of which the district court found unmeritorious, had the effect of prolonging suspension of the statute of limitations beyond the date class certification was denied. Indeed, under respondents' theory, tolling could continue indefinitely merely as a result of the repetitive filing of untimely, unmeritorious motions for reconsideration. This would not appear to be sound law. Moreover, respondents did not raise this "extended tolling" argument below on behalf of the three respondents whom it would benefit, and are barred by waiver from raising it on remand. The court below has already correctly found that if *American Pipe* applies, "[t]he tolling would have ended, and the remaining portion of the limitations period would have recommenced running on August 21, 1978, when the district court declined to certify the class." J.A. 132a. Thus, assuming application by this Court of *American Pipe* and a remand for proceedings not in-

case as it was interpreted and applied in *American Pipe*, the Rules Enabling Act will be violated. However, application of the Rules Enabling Act analysis, as elaborated in *Hanna* v. *Plumer*, 380 U.S. 460 (1965), "is premised on a 'direct collision' between the Federal Rule and the state law." *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 749 (1980) (citation omitted). No such collision can occur in the instant case, and respondents' argument fails accordingly.

The very reason for tolling the statute of limitations in this case arises from an overriding uniform federal rule of procedure governing class action practice in the federal courts. *American Pipe & Construction Co.* v. *Utah, supra; cf. Pavlak* v. *Church, supra.* As such, the rule of *American Pipe* controls and state law never comes into play, nor, indeed, does an analysis under 42 U.S.C. § 1988. Yet, even if we look to Section 1988, it is clear that federal law must be applied unless it is found to be deficient; only then does one look to state law, which applies unless it is inconsistent with the Constitution and laws of the United States. Thus, the very terms of Section 1988 make clear that no conflict in a Rules Enabling Act sense can occur.

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consistent therewith, any "extended tolling" argument would clearly be foreclosed to respondents.

Finally, respondents' suggestion that the court below be allowed on remand to consider "the applicability of Puerto Rico tolling law to [respondents'] pendent Puerto Rico claims . . .," is entirely frivolous. This Court held in *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966), that where federal claims are untimely and thus should be dismissed, pendent state claims should be dismissed as well. *See also Hupp* v. *Gray*, 500 F.2d 993, 998 (7th Cir. 1974). Under this principle, if *American Pipe* applies and respondents' Section 1983 claims must be dismissed as untimely, there is no further basis for consideration by the Court of Appeals of the application of state law to respondents' state law-based claims.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the judgment of the United States Court of Appeals in this case.

Respectfully submitted,

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I.	II.	III.	IV.	V.	VI.
Respondent	Date of Notice[1]	Expiration of Statute of Limitations[2]	Period of Statute of Limitations Remaining on June 19, 1978[3] (Days)	Expiration of Statute of Limitations after Denial of Class Certification	Date Complaint Filed[4]
Nunez-Rivera, Carmen	6/77[5]	6/78	11	9/1/78	1/10/79
Negron-Marin, Carmen L.	6/23/77 (App.84)	6/23/78	4	8/24/78	1/10/79
Montes-Velez, Carmen H.	6/17/77 (App.85)	6/17/78[6]	0[6]	N/A	1/10/79
Garcia Rosado, Carmen	7/5/77 (App.86)	7/5/78	16	9/6/78	1/10/79
Torres de Cantres, Noelia	6/20/77 (App.87)	6/20/78	1	8/22/78	1/10/79
Rodriquez Rivera, Antonio	Last week of June 1977 (App.91)	Last week of June 1978	11	9/1/78	1/10/79
Aponte de la Torre, Jose E.	6/30/77 (App.93)	6/30/78	11	9/1/78	1/15/79
Cardona-Flores, Nilsa	6/17/77 (App.95)	6/17/78[6]	0[6]	N/A	1/15/79

Footnotes are explained on pp. 6A-7A.

I.	II.	III.	IV.	V.	VI.
Respondent	Date of Notice[1]	Expiration of Statute of Limitations[2]	Period of Statute of Limitations Remaining on June 19, 1978[3] (Days)	Expiration of Statute of Limitations after Denial of Class Certification	Date Complaint Filed[4]
Colon Torres, Elba M.	6/17/77 (App.96)	6/17/78[6]	0[6]	N/A	1/15/79
Sierra Pizarro, Aurora	6/24/77 (App.42)	6/24/78	5	8/26/78	1/15/79
Otero-Arroyo, Virginia	6/23/77 (App.99)	6/23/78	4	8/25/78	1/15/79
Ortiz-Colon, Ana Mercedes	6/17/77 (App.102)	6/17/78[6]	0[6]	N/A	1/15/79
Fumero Soto, Juan	6/20/77 (App. 103)	6/20/78	1	8/22/78	1/15/79
Castro De Aguilar, Dora	6/20/77 (App.40)	6/20/78	1	8/22/78	1/15/79
Rodriquez-Solivan, Reinaldo	7/11/77 (App.106)	7/11/78	22	9/12/78	1/19/79
Denis, Sylvia M.	6/17/77 (App.107)	6/17/78[6]	0[6]	N/A	1/15/79

Footnotes are explained on pp. 6A-7A.

I.	II.	III.	IV.	V.	VI.
Respondent	Date of Notice[1]	Expiration of Statute of Limitations[2]	Period of Statute of Limitations Remaining on June 19, 1978[3] (Days)	Expiration of Statute of Limitations after Denial of Class Certification	Date Complaint Filed[4]
Castro del Valle, Bienvenido	6/17/77 (App.108)	6/17/78[6]	0[6]	N/A	1/15/79
Rosario de Bravo, Elba	Third week of June 1977 (App.111)	Third week of June, 1978	5	8/26/78	1/15/79
Norat Zayas, Ramon	6/23/77 (App.113)	6/23/78	4	8/25/78	1/12/79
Quiles Mariani, Charles H.	7/77[5]	7/78	42	10/2/78	1/15/79
Gonzalez-Velazquez, Santiago	6/17/77 (App.117)	6/17/78[6]	0[6]	N/A	1/26/79
Rivera Diaz, Bienvenido	Third week of June 1977 (App.118)	Third week of June, 1978	5	8/26/78	1/26/79
Morales-Hernandez, Carmen M.	7/11/77 (App.120)	7/11/78	22	9/12/78	1/26/79
Rivera-Pagan, Juan	6/77[5]	6/78	11	9/1/78	1/26/79

Footnotes are explained on pp. 6A-7A.

I.	II.	III.	IV.	V.	VI.
Respondent	Date of Notice[1]	Expiration of Statute of Limitations[2]	Period of Statute of Limitations Remaining on June 19, 1978[3] (Days)	Expiration of Statute of Limitations after Denial of Class Certification	Date Complaint Filed[4]
Colon Santiago, Angela	6/17/77 (App.121)	6/17/78[6]	0[6]	N/A	1/26/79
Cruz-Mendez, Joaquin	Last week of June/ first week of July 1977 (App.122)	Last week June/ 1st week July 1978	12	9/2/78	1/26/79
Aguilar Quintero, Ursula	Third week of June, 1977 (App.123)	Third week of June, 1978	5	8/26/78	1/26/79
Rivera Cardona, Aminta	6/77[5]	6/78	11	9/1/78	1/26/79
Cruz-Cruz, Roberto	Third week of June, 1977 (App.124)	Third week of June, 1978	5	8/26/78	1/26/79
Velez Quinonez, Nelson	6/22/77 (App.125)	6/22/78	3	8/24/78	1/26/79
Cancel-Cuevas, Cristina	6/77[5]	6/78	11	9/1/78	1/31/79
Guerra-Navarro, Maria D.	6/77[5]	6/78	11	9/1/78	1/31/79

Footnotes are explained on pp. 6A-7A.

I.	II.	III.	IV.	V.	VI.
Respondent	Date of Notice[1]	Expiration of Statute of Limitations[2]	Period of Statute of Limitations Remaining on June 19, 1978[3] (Days)	Expiration of Statute of Limitations after Denial of Class Certification	Date Complaint Filed[4]
Bonilla-Ocasio, Francisco	8/8/77 (App.126)	8/8/78	50	10/10/78	1/31/79
Gallardo Gutierrez, Heriberto	11/4/77 (App.127)	11/4/78	138	1/6/79	1/31/79
Colon, Julio E.	7/6/77 (App.128)	7/6/78	17	9/7/78	1/31/79
Rodriguez Rios, Aida	6/20/77 (App.129)	6/20/78	1	8/22/78	1/24/79

Footnotes are explained on pp. 6A-7A.

FOOTNOTES

[1] These dates are derived from either (i) a sworn statement filed in the district court, (ii) a letter of protest attached to certain complaints, or (iii) a generous approximation of when notice was received taken from certain other complaints. Pursuant to district court order, sworn statements were filed by 28 respondents attesting to the dates on which they received notice of non-reappointment. In the case of two respondents, where no sworn statement could be readily found, copies of the letters of protest sent by them to the Office of the Secretary of Education after receiving notice of their non-reappointment have been used. As is apparent, these respondents had received their notifications on or before the dates of these letters. The date shown in the foregoing table is, however, the later date of the protest letter. The sworn statements and letters of protest are included in the Joint Appendix in the Court of Appeals proceeding, as indicated by the references adjacent to the notice dates. As to the remaining six respondents, the notice date herein is based on their general allegations in their complaints. *See* n.5 below.

[2] The applicable statutes of limitations for purposes of these § 1983 actions is one year. 31 L.P.R.A. 5298(2).

[3] Assuming that the filing of Ortiz Rivera's class action on June 19, 1978, tolled the running of the statute as to certain respondents, these figures indicate how much time remained for each of them. If suspended, the statutory period resumed running when class certification was denied on August 21, 1978.

[4] These dates have been taken directly from the district court docket sheets in each of these consolidated cases and their accuracy has been stipulated by all parties.

[5] The complaints of these respondents provide the only currently available data as to receipt of notice. Para. 10 of the complaints of Nunez Rivera, Rivera Cardona, Cancel Cuevas, Guerra-Navarro, and Rivera Pagan allege that notice was received "[o]n or about June, 1977." Para. 10 of the complaint of Quiles Mariani alleges "[o]n or about July, 1977." All parties have stipulated that the complaints of these respondents so state. For purposes of the information in this table, it is assumed that these respondents received notice on the last day of the specified month.

[6] The Court of Appeals held as to these eight respondents that the statute of limitations did not expire on June 17, 1978, since it was a Saturday; that under Rule 6, Fed. R. Civ. P., Saturdays, Sundays, and legal holidays are excluded from time computations; and therefore that the filing of the class suit by Ortiz Rivera on Monday, June 19, 1978, tolled the running of the statute of limitations as to them.